

1 ORDER

2 The Department of Ecology Order No. DE 84-300 is vacated and the  
3 matter is remanded for factual determinations and further  
4 considerations consistent with these findings and conclusions.

5 DATED this 19<sup>th</sup> day of December, 1984.

6 POLLUTION CONTROL HEARINGS BOARD

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9 GAYLE ROTHROCK, Chairman

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26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 84-171 & -181  
CONCURRING OPINION

1 and the public interest. For that reason, the subject order is set  
2 aside and the matter remanded to the Department for further data  
3 collection, including current and historic pond level measurements on  
4 each owner's pond boundaries.

#### 5 VII

6 The landowners must accept a factually-supported and negotiated  
7 level for the pond and then share in the payment for pond level  
8 restoration. This agreed-upon level may require artificial devices to  
9 maintain that level and resolve the conflict amongst the owners.  
10 Here, it is not a useful function of this Board to make these  
11 technical determinations and recommendations in the first instance;  
12 such is the responsibility of the Department, with the full  
13 cooperation of the owners. DOE and the owners can, after considering  
14 the matter further, reach a satisfactory solution to this problem.

#### 15 VIII

16 Any Finding of Fact which should be deemed a Conclusion of Law is  
17 hereby adopted as such.

18 From these Conclusions the Board enters this  
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26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 84-171 & -181  
CONCURRING OPINION

1 reduction of the substantially natural condition during this season  
2 (fall) of the year.

3 IV

4 Whether DOE has the authority to issue an order to enforce RCW  
5 90.54, instead of limiting itself to rulemaking, (as it pertains to  
6 ponds) is more difficult to answer. There is authority in a prior  
7 PCHB case cited by DOE (Smith v. DOE & Lucas, PCHB No. 81-34) applying  
8 to stream care under RCW 90.54. That also logically applies to  
9 ponds. Regulatory orders apply to any chapter or statute the director  
10 of the department is charged with administering and to all natural  
11 water bodies cited in those statutes. While it cannot be shown that  
12 appellants intend to wholly drain the pond, and it has not been shown  
13 OBA should be solely responsible for illegal stream outlet clearance  
14 on its land, it cannot be claimed that the department has no right to  
15 issue regulatory orders under the Water Resources Act of 1971. The  
16 only claim which can be supported is that inadequate numbers of  
17 parties were held responsible for resolution of the pond maintenance  
18 problem.

19 V

20 DOE is empowered to issue such an order but it must issue with  
21 assurances that it is predicated upon good data which can be relied  
22 upon by all parties responsible for a solution. The one steel post  
23 measure on the Racine property is inadequate data.

24 It is in the interests of the state and owners of the pond to  
25 arrive at a level of the lake that benefits their individual interests

26 FINAL FINDINGS OF FACT,  
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1 some persons were attempting to reduce the size of the pond, that  
2 appellants should be responsible, and that some persons were going to  
3 attempt to further drain the pond. Hence the order was issued.

4 A regulatory order is not the usual method of enforcing chapter  
5 90.54. The Department acknowledges that this is the first time an  
6 order has been issued to enforce this RCW chapter, as it relates to  
7 ponds. The Board examines this authority, then, very carefully.

## 8 XII

9 Any Conclusion of Law which should be deemed a Finding of Fact is  
10 hereby adopted as such.

11 From these Findings the Board comes to these

## 12 CONCLUSIONS OF LAW

### 13 I

14 The Board has jurisdiction over these persons and these matters.  
15 RCW 43.21B.

### 16 II

17 The subject body of water is a pond within the meaning of RCW  
18 90.54.020(3)(a).

### 19 III

20 The lake has varied 15' to 20' horizontally over the years. The  
21 testimony is conflicting on the historic size of the lake. It is  
22 ascertainable that the post-blast 1984 level of the pond is lower than  
23 it has been in recent years. Water marks on stumps attest to that, as  
24 does the overly-elevated duck blind. The preponderance of the  
25 evidence indicates that the present level represents a modest

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PCHB Nos. 84-171 & -181  
CONCURRING OPINION

1 1971 (RCW 90.54) as it pertains to ponds; and finally, (4) if it does,  
2 did DOE follow the correct procedure in issuing the order?

3 X

4 Appellants each testified that it is not their intent to drain the  
5 pond. They assert their only desire is to control the water level so  
6 that it does not flood their property. The state asserts ponds must  
7 be retained substantially in their natural condition and wetland areas  
8 should be protected. RCW 90.58.020(3)(a) states

9 (3) The quality of the natural environment shall be  
10 protected and, where possible, enhanced as follows:

11 (a) Perennial rivers and streams of the state  
12 shall be retained with base flows necessary to  
13 provide for preservation of wildlife, fish,  
14 scenic, aesthetic and other environmental  
15 values, and navigational values. Lakes and  
16 ponds shall be retained substantially in their  
natural condition. Withdrawals of water which  
would conflict therewith shall be authorized  
only in those situations where it is clear that  
overriding considerations of the public interest  
will be served.

17 Further, the state acted by issuing a regulatory order under statutory  
18 authority they deemed to be correct.

19 RCW 43.21A.190 states:

20 A regulatory order may be issued to a person  
21 violating or about to violate, the following chapters  
22 . . .

23 (6) Any other chapter or statute the Director of the  
24 Department of (Ecology) is charged with  
25 administering. . .

26 XI

27 DOE argues that these above-cited provisions of the law enable the  
Department to issue a regulatory order. The Department believes that

1           3.    The crest of the weir shall be at the same  
2                elevation as the top of the steel post located  
3                approximately 750 feet west and 870 feet north  
4                from the southeast corner of Section 26, T. 19  
5                N., R. 3 W.W.M. Said steel post being located  
              on the Alfred G. Racine property and identified  
              by florescent color and marked by florescent  
              flagging.

6 and further required that there be no ditching of or modification to  
7 the outlet stream on Lot 4 of the proposed OBA large lot subdivision.

8                               VII

9           Feeling aggrieved by this order of DOE, appellants appealed to  
10 this Board on June 27, 1984.

11                              VIII

12           Mr. Edgington testified that in the more distant past, the lake  
13 had been approximately three quarters of its present size. He  
14 indicated that it has always fluctuated with the seasons of the year.  
15 There is a system of drain tiles beneath his fields in this area which  
16 were installed prior to the time the parties in the case acquired  
17 their properties. These drain tiles allow and direct flow into the  
18 pond. The runoff from this drainage system, plus the rainwater,  
19 apparently constitute the primary source of refill for the pond,  
20 although there may well be underground springs.

21                              IX

22           The questions for the Board to answer are: (1) is this pond a pond  
23 deserving a protection under operation of RCW 90.54.020(3)(a); (2) if  
24 it is, what is the "natural condition" of the pond; (3) does DOE have  
25 the authority to issue an order to enforce the Water Resources Act of

26 FINAL FINDINGS OF FACT,  
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1 impacts and aesthetic impacts. More importantly for Mr. Edgington was  
2 the impact on his dairy cattle. Mr. Edgington has operated a small  
3 dairy farm on this site for approximately 34 years. The pond has  
4 always been a source of water for his herd. The dropping of the pond  
5 level and the resultant runoff of water, however, made it more  
6 difficult for the cows to reach the pond.

7 As a result of these complaints, DOE investigated the situation.  
8 Several meetings occurred with the landowners and numerous state and  
9 county officials. The Department attempted to get the landowners to  
10 agree on an average natural high water level for the pond, but  
11 agreement failed to materialize.

## 12 VI

13 In early May of this year a DOE official placed a steel post in  
14 the pond, the top of which was aligned with his determination of the  
15 average high water mark in the pond as seen from Racine's property.  
16 Then, on May 25, 1984, when it became apparent that negotiations would  
17 be fruitless, DOE issued order No. DE 84-300. By that order DOE  
18 ordered Oyster Bay Associates to

19 Construct a weir within the existing ditch located on  
20 Lot 1 of the proposed subdivision identified under  
21 Thurston County Large Lot case No. LL-0266. The weir  
shall conform to the following specifications:

- 22 1. The bulkhead shall be of rectangular design and  
23 constructed of wood, concrete, or steel. If  
wood is used, the crest of the weir shall be  
steel.
- 24 2. The minimum length of the crest shall be 36  
25 inches.

26 FINAL FINDINGS OF FACT,  
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CONCURRING OPINION

1 water level in recent memory. That water level can be determined by  
2 carefully viewing the many stumps around the perimeter of the pond and  
3 locating the high water mark thereon. Observations of water marking  
4 can also be made off an old raised duck blind. Aerial photos suggest  
5 that during the winter and early spring the pond is higher than at  
6 other seasons.<sup>1</sup> Then during the summer and fall, the water level  
7 recedes depending on the climatic conditions.

#### 8 IV

9 In the early spring of 1983 the northwest outlet to the pond was  
10 blasted open. The ditch was deepened and widened. The pond level  
11 immediately began to drop. Subsequently, on May 28, 1984, the outlet  
12 was again blasted open. This was verified by Messrs. Racine and  
13 Edgington who testified they heard the blast. This time the ditch was  
14 deepened and widened even further. Some witnesses testified the pond  
15 dropped as much as three feet and the run-out from pond's edge became  
16 50 feet. Mr. Racine testified that the water level in the pond  
17 dropped approximately 15" to 18" vertically, resulting in a horizontal  
18 runout of approximately 20 to 25 feet at the southwest pond corner.

#### 19 V

20 As a result, both Messrs. Racine and Edgington submitted written  
21 complaints to the Department of Ecology (DOE). They objected to the  
22 level of the pond dropping for several reasons, including wildlife  
23

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24 1. Although, this is somewhat difficult to verify because of the  
25 brown algae that rests on the water which may look like ground instead  
26 of water when viewed from the air.



1 pond is part of 46 acres OBA is planning to develop through a large  
2 lot subdivision.

3 II

4 The pond hosts wildlife. Several species of ducks and geese use  
5 the pond. Otters, beavers and muskrat frequent the pond. A large  
6 blue heron rookery is located just west of the pond and the heron use  
7 the pond extensively. The Washington Department of Game considers all  
8 the wildlife, and especially the rookery, quite significant, as the  
9 rookery currently contains approximately 75 nests and hosts  
10 approximately 60 pairs of great blue herons. The heron move the  
11 rookery from place to place periodically.

12 III

13 The pond has two notable outlets. One runs westerly from the  
14 southwest corner of the pond, and appears to be the primary outlet  
15 from the pond. The other outlet runs north-northwesterly from the  
16 northwest corner of the pond. It appears that this northwest outlet  
17 may have been artificially enlarged sometime in the past. It has  
18 generally not been kept clear, being the victim of siltation and  
19 beavers' dam building. It was blocked altogether when a logging road  
20 was put in across the ditch. Exactly when this occurred is not known,  
21 although appellants believe it was about 1975.

22 The ditch apparently remained in this blocked, nonmaintained  
23 condition for a number of years. Beavers built dams at strategic  
24 points back from this outlet. The pond level, while fluctuating  
25 during the wet and dry seasons, has maintained a relatively uniform

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
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CONCURRING OPINION

1 Board were Lawrence J. Faulk (presiding) and Gayle Rothrock.  
2 Respondents elected a formal hearing pursuant to RCW 43.21B and WAC  
3 371-08.

4 The proceedings were electronically recorded and officially court  
5 reported by Barker & Associates of Olympia, Washington.

6 Respondent Department of Ecology was represented by Assistant  
7 Attorney General, Jay J. Manning. Appellant Oyster Bay Associates was  
8 represented by general partner, John S. Blyth and Ray E. Carter  
9 represented himself.

10 Witnesses were sworn and testified. Exhibits were admitted and  
11 examined and oral argument was heard. A site visit was made on  
12 October 16, 1984. From the testimony, evidence, and contentions of  
13 the parties the Board makes these

14 FINDINGS OF FACT

15 I

16 This matter involves a wetland area and pond located on property  
17 adjacent to Steamboat Island Road in northern Thurston County. The  
18 pond is approximately 18 acres in size, is not deep and has numerous  
19 stumps, and snags, and grasses protruding from its surface.

20 Four landownerships cover different parts of the pond. Lindsay  
21 Edgington, a dairy farmer, owns the northeast corner; Alfred Racine,  
22 retired and a duck hunter, owns the southeast corner; Ray Carter and  
23 Jack Batchelor own a north-northwest corner and periodically cut  
24 firewood from this small parcel; and Oyster Bay Associates (OBA) owns  
25 the majority of the pond and all of the southwest portion of it. The

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 84-171 & -181  
CONCURRING OPINION

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
OYSTER BAY ASSOCIATES,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

---

RAY E CARTER,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY, AND  
OYSTER BAY ASSOCIATES,

Respondents.

---

PCHB Nos. 84-171 & 84-181

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER

These matters, the appeals of a Department of Ecology Order No. DE 84-300, issued pursuant to RCW 90.54.020(3)(a), came on for hearing on October 11 and 12, 1984, in Lacey, Washington. Seated for and as the

ORDER

The Department of Ecology Order No. DE 84-300 is vacated and the matter is remanded for further consideration consistent with this decision.

DATED this 19<sup>th</sup> day of December, 1984.

POLLUTION CONTROL HEARINGS BOARD

 12/19/84  
LAWRENCE J. FAULK, Vice Chairman

See Concurring Opinion  
GAYLE ROTHROCK, Chairman

Elected to Not Participate  
WICK DUFFORD, Lawyer Member

VIII

The Board would suggest that DOE attempt to persuade the landowners to agree upon a level for the lake. This agreed-upon level may or may not require artificial devices to maintain that level and resolve the conflict amongst the owners. It is not the function of this Board to make these recommendations in the first instance; such is the responsibility of DOE. The Department and the five owners conceivably can, after considering the matter further, reach a satisfactory solution to this problem.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

1 it has been in recent years. Water marks on stumps attest to that, as  
2 does the overly-elevated duck blind. The preponderance of the  
3 evidence plus our site visit indicates that the present level  
4 represents substantially the natural condition during this season  
5 (fall) of the year.

6  
7 V

8 Whether DOE has the authority to issue an order to enforce RCW  
9 90.54 of the law as it pertains to ponds is more difficult to answer.  
10 The Board believes that the case quoted by DOE (Smith v. DOE & Lucas,  
11 PCHB No. 81-34) applied to streams and not ponds. Further upon  
12 reading that opinion I do not reach the same conclusion as the  
13 Department. Regulatory orders apply to appropriation of state waters  
14 not ponds of this state. In addition, and as a practical matter, the  
15 Board believes that appellants do not intend to drain the pond. For  
16 these reasons the DOE order should be vacated.

17 VI

18 We express no opinion on whether DOE followed the proper procedure  
19 in issuing Order No. DE 84-300.

20 VII

21 It is the interests of the five owners of the pond to arrive at a  
22 level of the lake that benefits their individual interests. For that  
23 reason, the order is vacated and the matter remanded to the Department  
24 for further consideration.

25  
26 FINAL FINDINGS OF FACT,  
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1 some persons were attempting to reduce the size of the pond, that  
2 appellants should be responsible, and that some persons were going to  
3 attempt to further drain the pond. Hence the order was issued.

4 A regulatory order is not the usual method of enforcing chapter  
5 90.54. The Department acknowledges that this is the first time an  
6 order has been issued to enforce this RCW chapter, as it relates to  
7 ponds. As a result, the Board must examine this reach for authority,  
8 very carefully.

9 XII

10 Any Conclusion of Law which should be deemed a Finding of Fact is  
11 hereby adopted as such.

12 From these Findings the Board comes to these

13 CONCLUSIONS OF LAW

14 I

15 The Board has jurisdiction over these persons and these matters.  
16 RCW 43.21B.

17 II

18 Respondent DOE has the burden of proof in this case.

19 III

20 The Board believes the subject body of water is a pond within the  
21 meaning of RCW 90.54.020(3)(a).

22 IV

23 The lake has varied 15' to 20' horizontally over the years. The  
24 testimony is conflicting on the historic size of the lake. It is  
25 ascertainable that the post-blast 1984 level of the pond is lower than  
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27 FINAL FINDINGS OF FACT,  
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1 1971 (RCW 90.54) as it pertains to ponds; and finally, (4) if it does,  
2 did DOE follow the correct procedure in issuing the order?

3 X

4 Appellants each testified that it is not their intent to drain the  
5 pond. They assert their only desire is to control the water level so  
6 that it does not flood their property. The state asserts ponds must  
7 be retained substantially in their natural condition and wetland areas  
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23 authority they deemed to be correct.

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29 DOE argues that these above-cited provisions of the law enable the  
30 Department to issue a regulatory order. The Department believes that



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2                elevation as the top of the steel post located  
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8                               VII

9       Feeling aggrieved by this order of DOE, appellants appealed to  
10   this Board on June 27, 1984.

11                           VIII

12       Mr. Edgington testified that in the more distant past, the lake  
13   had been approximately three quarters of its present size. He  
14   indicated that it has always fluctuated with the seasons of the year.  
15   There is a system of drain tiles beneath his fields in this area which  
16   were installed prior to the time the parties in the case acquired  
17   their properties. These drain tiles allow and direct flow into the  
18   pond. The runoff from this drainage system, plus the rainwater,  
19   apparently constitute the primary source of refill for the pond,  
20   although there may well be underground springs.

21                           IX

22       The questions for the Board to answer are: (1) is this pond  
23   classified as a pond in accordance with RCW 90.54.020(3)(a); (2) if it  
24   is, what is the natural condition of the pond; (3) does DOE have the  
25   authority to issue an order to enforce the Water Resources Act of

26   FINAL FINDINGS OF FACT,  
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1 impacts and aesthetic impacts. More importantly for Mr. Edgington was  
2 the impact on his dairy cattle. Mr. Edgington has operated a small  
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4 always been a source of water for his herd. The dropping of the pond  
5 level and the resultant runoff of water, however, made it more  
6 difficult for the cows to reach the pond.

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8 Several meetings occurred with the landowners and numerous state and  
9 county officials. The Department attempted to get the landowners to  
10 agree on an average natural high water level for the pond, but  
11 agreement failed to materialize.

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13 In early May of this year a DOE official placed a steel post in  
14 the pond, the top of which was aligned with his determination of the  
15 average high water mark in the pond as seen from Racine's property.  
16 Then, on May 25, 1984, when it became apparent that negotiations would  
17 be fruitless, DOE issued order No. DE 84-300. By that order DOE  
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2 lot subdivision.

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14 southwest corner of the pond, and appears to be the primary outlet  
15 from the pond. The other outlet runs north-northwesterly from the  
16 northwest corner of the pond. It appears that this northwest outlet  
17 may have been artificially enlarged sometime in the past. It has  
18 generally not been kept clear, being the victim of siltation and  
19 beavers' dam building. It was blocked altogether when a logging road  
20 was put in across the ditch. Exactly when this occurred is not known,  
21 although appellants believe it was about 1975.

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24 points back from this outlet. The pond level, while fluctuating  
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12 October 16, 1984. From the testimony, evidence, and contentions of  
13 the parties the Board makes these

#### 14 FINDINGS OF FACT

##### 15 I

16 This matter involves a wetland area and pond located on property  
17 adjacent to Steamboat Island Road in northern Thurston County. The  
18 pond is approximately 18 acres in size, is not deep and has numerous  
19 stumps, and snags, and grasses protruding from its surface.

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PCHB Nos. 84-171 & 84-181

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER

These matters, the appeals of a Department of Ecology Order No. DE 84-300, issued pursuant to RCW 90.54.020(3)(a), came on for hearing on October 11 and 12, 1984, in Lacey, Washington. Seated for and as the